

(6)

Supreme Court, U.S.

FILED

OCT 22 1999

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF JUSTICE; AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioners

CHARLES J. COOPER
ANDREW G. MCBRIDE
COOPER, CARVIN &
ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

Counsel of Record
for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: MAY 27, 1999
CERTIORARI GRANTED: SEPTEMBER 10, 1999

62PP

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON (SPOK-YAK)

CIVIL No.: 95-CS-519

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
UNITED STATES DEPARTMENT OF STATE, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/14/94	2	SUMMONS/RETURN OF SERVICE executed upon defendant USA, de- fendant DOJ, defendant Dept of State (as) [Entry date 12/15/95]
11/17/95	1	COMPLAINT For Injunction To Produce Records Under Freedom of Information Act (Summons(es) is- sued) Fee-status: pd Receipt #: 34186 (as) [Entry date 11/20/95] * * * * *
1/19/96	3	ANSWER by defendant to complaint for injunction (as)

2/16/96 4 Plaintiff's MOTION For Summary Judgment (ech)
* * * * *

3/29/96 10 ORDER by Judge Fred L. Van Sickle (It is ordered that the motion for summary judgment would be GRANTED [4-1]; if any particular form od [sic] Order is required to effectuate this ruling, pltf may submit a proposed Order in due course) (cc: all counsel) (as)
* * * * *

4/9/96 12 Request by defendant for immediate hearing (as)
* * * * *

4/12/96 15 JUDGMENT (cc: all counsel) COB-142-92 (as)

4/12/96 16 MOTION by defendant to alter or amend judgment pursuant to Rule 59 (e) and to file document IN CAMERA or, in the alternative to stay pending appeal (as) [Entry date 04/15/96]
* * * * *

9/9/96 23 ORDER by Judge Fred L. Van Sickle granting in part and denying in part as moot, motion to alter or amend judgment pursuant to Rule 59(e) [16-1], motion to file document IN CAMERA [16-2], motion to stay pending appeal [16-3] (cc: all counsel) (pw) [Entry date 09/12/96]

10/16/96 24 MOTION by plaintiff to set aside judgment FRCP 60(b)(6) (pw)
* * * * *

11/25/96 33 Notice of appeal by plaintiff Les Weatherhead from Dist. Court decision Order filed 9/9/96 [23-1] (cc: all counsel and 9CCA) (vr) [Entry date 11/26/96]
* * * * *

12/2/96 35 ORDER by Judge Fred L. Van Sickle denying motion to set aside judgment FRCP 60(b)(6) [24-1] (cc: all counsel) (pw)

12/9/96 36 Notification by Circuit Court of Appellate Docket Number [33-1] 9CCA Number: 96-36260 Date appeal filed 11/25/96 (vr)
* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 96-36260

LESLIE R. WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF JUSTICE;
US DEPT OF STATE, DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
12/5/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADSENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 12/5/96; appellee's designation of RT is due 12/16/96; appellant shall order transcript by 12/26/96; court reporter shall file transcript in DC by 1/27/97; certificate of record shall be filed by 2/3/97; appellant's opening brief is due 3/13/97; appellees' brief is due 4/14/97; appellants' reply brief is due 4/28/97; [96-36260] (sf)
	* * * * *
3/24/98	Filed order (Deputy Clerk: eu) The Government is requested to furnish copies of

the withheld letter to the panel under appropriate security precautions as soon as possible before the date of schedule oral argument, 4/8/98. (PHONED OUT AT 3:55 P.M.) [96-36260] (gail)

4/8/98 ARGUED AND SUBMITTED TO Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN [96-36260] (jmk)

10/6/98 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Procter R. HUG, author; Stephen R. REINHARDT; Barry G. SILVERMAN, dissenting.) FILED AND ENTERED JUDGMENT. [96-36260] (jjf)

* * * * *

2/26/99 Filed order (Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN): The panel has voted to deny Aples' pet for rhrg and to reject the sugg for rhrg en banc. . . . The pet for rhrg is denied and the sugg for rhrg en banc is rejected. (For complete text see order.) [3569422-1] [96-36260] (gail)

3/4/99 Filed aples' motion for a stay of the mandate: decl of Strobe Talbott [96-36260] served on 3/2/99 (PANEL)([3628026] (gail)

3/9/99 Filed AMENDED order (Procter R. HUG, Stephen R. REINHARDT, Barry G. SILVERMAN): Chief Judge Hug and

Judge Reinhardt voted to deny Aples' pet for rhrq and to reject the sugg for rhrq en banc. Judge Silverman voted to grant the pet for rhrq and to accept the sugg for rhrq en banc. The full ct was advised of the sugg for rhrq en banc. An active judge requested a vote on whether to rehear the matter en banc. [T]he matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. FRAP 35. The pet for rhrq is denied and the sugg for rhrq en banc is rejected. [3569422-1] [96-36260] (gail)

3/10/99 Filed order (Procter R. HUG): The mtn to stay the mandate is GRANTED. [3628026-1] [96-36260] (gail)

6/3/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1904 filed on 5/27/99. [96-36260] (gal)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Civil No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

COMPLAINT FOR INJUNCTION
TO PRODUCE RECORDS UNDER
FREEDOM OF INFORMATION ACT

[Filed: Nov. 17, 1995]

Comes now plaintiff Leslie R. Weatherhead, through his attorney Gregory J. Workland, Esq., and for cause of action against defendants alleges as follows:

I. JURISDICTION AND VENUE

1.1 This action is brought under 5 U.S.C. §552(a) seeking an injunction compelling defendants to cease withholding and to deliver information to plaintiff.

1.2 Venue is proper in the Eastern District of Washington under 5 U.S.C. §552(a)(4)(B) in that plaintiff has at all material times resided in this district.

II. PARTIES

2.1 Plaintiff is an individual citizen of the United States residing in Spokane, Washington.

2.2 Defendants United States Department of Justice and United States Department of State are federal administrative agencies acting as official arms of the United States Government, and as such are subject to the requirements of 5 U.S.C. §552.

III. FACTS

3.1 On November 29, 1994, plaintiff requested that defendants, or either of them, produce a document specifically identified by plaintiff. Plaintiff offered to pay reasonable costs of retrieval. See attachments A and B to this complaint, incorporated by reference herein.

3.2 Defendants acknowledged that they had identified and located the document requested by plaintiff, but failed and refused to deliver a copy as requested.

3.3 At no time did defendants, or either of them, attempt to justify their failure and refusal to deliver the requested document in any way. They have simply refused to do their statutory duty without even pretense of lawful authority.

3.4 Plaintiff has exhausted his administrative remedies in his efforts to retrieve a copy of the requested document. More than a year has passed since his initial request, and nearly sixty days have passed since defendants advised that plaintiff was entitled to sue (though defendants still indicate they are thinking about

whether to do their duty under the statute). See Attachments C-K, incorporated by reference herein.

3.5 Defendants' refusal to deliver the information requested, which defendants have never even attempted to justify under any asserted exemption under the Freedom of Information Act, 5 U.S.C. §552, is contrary to law. Pursuant to the statute plaintiff is entitled to an injunction forbidding unlawful withholding and compelling production of the requested document.

WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT IN HIS FAVOR AS FOLLOWS:

1. For a preliminary and permanent injunction requiring defendant to cease withholding production of the document requested and compelling its prompt production to plaintiff;
2. For an award of Plaintiff's costs and reasonable attorneys' fees herein; and
3. For such other and further relief as to the court may seem equitable in the circumstances.

Dated this 14th day of November, 1995.

By

/s/ GREGORY J. WORKLAND
GREGORY J. WORKLAND
Attorney for Plaintiff

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

U.S. BANK BUILDING
 422 WEST RIVERSIDE, SUITE 1100
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other office address omitted]

November 29, 1994

Director, Office of Freedom
 of Information Privacy and
 Classification Review
 Department of State
 2201 C Street N.W.
 Washington, D.C. 20520-1512

Re: FOIA Request

Dear Sir or Madam:

This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan.

EXHIBIT A

Naturally, I will pay reasonable charges for location, copying and mailing of this document. If you have any questions, kindly call me at (509) 624-5265, or fax me at (509) 458-2717.

Very truly yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By /s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW:sls

LRW/9411.029

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

U.S. BANK BUILDING
 422 WEST RIVERSIDE, SUITE 1100
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other office address omitted]

November 29, 1994

Freedom of Information Act Officer
 Office of Public Affairs
 Department of Justice
 Tenth and Constitution Avenue N.W.
 Washington, D.C. 20530

Re: FOIA Request

Dear Sir or Madam:

This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan.

EXHIBIT B

Naturally, I will pay reasonable charges for location, copying and mailing of this document. If you have any questions, kindly call me at (509) 624-5265, or fax me at (509) 458-2717.

Very truly yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By
 /s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW:sls

LRW/9411.030

[Seal omitted]

U.S. Department of State
Washington, D.C. 20520

Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
Attorneys & Counselors
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Dec. 19, 1994

Request Number 9405059

Dear Sir/Madam:

Thank you for your letter of November 29, 1994 in which you requested:

a copy of a letter dated July 28, 1994 to George Procter of the Department of Justice from the British home office related to the extradition of Sally Croft and Susan Hagan.

The following information may explain certain boundaries of the Department's search for documents in response to Freedom of Information Act requests.

The cut-off date for retrieving documents is the date of the requester's letter. Accordingly, no documents which originated after the date of your letter will be retrieved.

EXHIBIT C

Only existing documents are subject to the Freedom of Information Act. The Act does not provide for the creation of documents, compilation of data, preparation of lists, analyses of events, etc.

- [x] We have begun to process your request based upon the information provided in your letter. As soon as responsive material has been retrieved and reviewed, we will notify you.
- [] Before we can proceed, we need the additional information requested in the marked paragraph(s) in *Section A and/or B*. (We attempted to reach you by phone on _____ to discuss the need for this information). We will hold your request open for ninety (90) days from the date of this letter pending receipt of the requested information.
- [x] Please review the fee information provided in *Section C*.
- [x] *SECTION C*

The Freedom of Information Act requires agencies to collect fees to recover the costs of processing requests, unless a fee waiver has been granted or the charges fall below a certain amount. The following marked paragraphs address these issues.
- [] Your request for a fee waiver has been granted.
- [] Your request for a fee waiver has been denied. Should you wish to appeal this decision, you may write to: Peter Sheils, Chief, Requests Manage-

ment Division, at the address indicated below. Your appeal should address the points listed in the enclosed sheet entitled "Requests for Fee Waivers."

- [x] You have stated your willingness to pay the fees associated with the processing of this request. (ALL).
- [x] Based upon the information that you have provided, this request will be processed in accordance with the fee schedule designated for the following category of requesters. (See Subsection 171.14 of the enclosed Rules and Regulations).
 - [] commercial use requesters
 - [] educational institutions
 - [] non-commercial scientific institutions
 - [] representatives of the news media
 - [x] all other requesters

The Department's search and review fees are:

Administrative/Clerical	\$8.00/hour
Professional	\$17.00/hour
Executive	\$30.00/hour

- [] You have indicated your inclusion in a category different from the one above. Please provide the information asked on the attached sheet entitled "Requester Categories" to substantiate your inclusion in a particular category of requester.

- [] Before I can make a decision about your request for a fee waiver, I will need additional information as noted in the attached sheet entitled "Requests for Fee Waivers."
- [] Your request for a fee waiver is being reviewed. We will notify you as soon as a decision has been made.
- [] I will not be able to make a determination about your fee waiver request until the processing of your case has been completed. At that time an independent evaluation of the releasable material will be made.
- [] Initial inquiries indicate that the total costs for processing this case will be below the minimum amount charged in your requester category. Accordingly, your request will be processed a [sic] no cost to you. Please note that this determination pertains only to this case.
- [] We will notify you of the costs incurred in processing your request as soon as the search and review actions have been completed.

- [x] Please be advised that the Department of Justice may also have information of the nature you seek. You may write them directly at the following address; Mr. Richard Huff: Co-Director; Room 933-Office of Legal Policy; Department of Justice; Washington, D.C. 20530.

If you have any questions with respect to the processing of your request, you may write to the Office of Freedom of Information, Privacy and Classification Review, Room 1512, Department of State, 2201 C Street, N.W., Washington, D.C. 20520-1512, or telephone: (202) 647-6070. Please be sure to refer to your request number in all correspondence about this case.

Sincerely,

/s/ REGINA L. EDWARDS for
Rosemary Melendy, Chief
Initial Processing and Control Branch
Office of Freedom of Information,
Privacy and Classification Review

Enclosure(s):

____ Rules and Regulations
____ Request for Fee Waiver
____ Requester Categories

[Seal omitted]

U.S. Department of Justice

Washington, D.C. 20530

JAN 31 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Building
422 West Riverside Avenue
Spokane, WA 99201-0390

Dear Mr. Weatherhead:

The Justice Management Division has referred your request of November 29, 1994, to the Criminal Division for our review and response to you. Your request has been assigned file number 950056F. Please refer to this number in any future correspondence with this Unit.

We will conduct a search to determine what records (if any) we have that are within the scope of your request. Once we have completed our search, we will

EXHIBIT D

notify you as to our disposition of your request. Please note that this search will encompass only Criminal Division records.

Sincerely,

/s/ L.J. JOACHIM
LINDA J. JOACHIM,
Attorney-Advisor
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

[Seal omitted]

United States Department of State
Washington, D.C. 20520

MAY 4 1995

Leslie Weatherhead
Witherspoon, Kelley, Davenport & Toole
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

RE: Freedom of Information Act Request No.
9405059 Information concerning a letter from
the British home office to George Proctor of
the Department of Justice

Dear Ms. Weatherhead:

Pursuant to your request, this office initiated a search of the records of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence.

The responsibilities of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence include bringing legal considerations to bear in formulating and carrying out U.S. foreign policy and in the administration of the Department and the Foreign Service. The Office of the Assistant Legal Adviser for Law Enforcement and Intelligence is responsible for general legal advice on the enforcement of international laws and

EXHIBIT E

regulations and on litigation relating to intelligence issues.

After a thorough search of the records of the Office of the Assistant Legal Adviser for Law Enforcement and Intelligence by professional employees familiar with this record system and its organization, no documents responsive to your request were located.

I regret that the Department's response is not more positive. Should you have any additional information which would assist us in conducting further searches of Department records systems, please let us know within 60 days of the date of this letter, and we will be pleased to resume the processing of your request. Send additional information to: Office of Freedom of Information, Privacy and Classification Review, Room 1512, Department of State, Washington, D.C. 20520-1512.

The D.C. Circuit Court of Appeals, in *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990), ruled that a "no record" response constitutes an adverse determination, thereby requiring an agency to give appeal rights to the requester.

Accordingly, our decision that the Department does not have any records responsive to your request may be appealed within 60 days of the date of this letter. Appeals should be addressed to: the Assistant Secretary for Public Affairs, Department of State, Washington, D.C. 20520-6800. A copy of the Department's appeal procedures is enclosed. Although I am fully satisfied that our record search has been thorough and complete, I did want to be sure that you are aware of this court decision.

The Freedom of Information Act permits Federal agencies to recover the direct costs of searching for and duplicating records that have been requested for non-commercial use. However, processing costs for your case are below the amount for which we charge fees, so your request has been processed at no cost to you.

Please refer to the request number shown above in all inquiries concerning this request.

Sincerely,

/s/ FRANK M. MACHAK
Frank M. Machak
Director
Office of Freedom of Information
Privacy and Classification Review

Enclosure:
As stated.

58116 *Federal Register*/Vol. 45, No. 171/Tuesday,
September 2, 1980
Rules and Regulations

Subpart G - Appeals Procedures

171.60 Appeal of denial of access to records

(a) Review of an initial denial of access to a record under the Freedom of Information Act (5 USC 552), the Privacy Act of 1974 (5 USC 552a), or Executive Order 12065 may be requested by the individual who submitted the initial request for access. The request for review (hereinafter referred to as the appeal) must be in writing and should be sent by certified mail to the Assistant Secretary for Public Affairs, Chairman, Appeals Review Panels, Department of State, 2201 C Street, N.W., Washington, D.C. 20520. The appeal should be received within 60 days of the date of the receipt by the appellant of the Department's refusal to grant access to a record in whole or in part.

(b) The time for decision on the appeal begins on the date the appeal is received by the Chairman, Appeals Review Panels. The appeal of a denial of access to records shall include any documentation, information and statements to support the individual's request for access and to refute the use of the exemption(s) cited in the Department's justification concerning the denial of access.

(c) The Chairman of the Appeals Panels or her/his designee and at least two other members chosen by her/him from a list of senior officers designated for this purpose by the various bureaus of the Department shall constitute a panel to consider and decide the appeal. There shall be a written

record of the reasons for the final determination. The final determination will be made within 30 working days for Executive Order and Privacy Act appeals, and within 20 working days (excluding Saturdays, Sundays, and holidays) for FOIA appeals. For good cause shown, the Chairman of the Appeals Review Panels may extend such determination beyond the 30-day period in Privacy Act cases.

(d) The Chairman shall then notify the requester in writing of the panel's decision to grant access and of the Department's regulations concerning access.

(e) When the final decision of the Panel is to refuse to grant an individual access to a record, the Chairman of the Panel shall advise the individual in writing:

(1) of the refusal to grant the appeal and the reasons therefor including the exemptions of the Freedom of Information Act, the Privacy Act of 1974, and/or Executive Order 12065 under which access is denied;

(2) of her/his right to seek judicial review of the Department's decision, where applicable.

[Seal omitted]

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

MAY 17 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
U.S. Bank Building
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is in response to your Freedom of Information Act request of November 29, 1994 for access to "... a copy of a letter from the British home office to George Proctor of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan".

Our search of Criminal Division files has located a copy of this document. Inasmuch as this document was created by a foreign government, we have referred it to

EXHIBIT F

the Department of State (which processes such records) for that office's review and direct response to you.

Sincerely,

/s/ MARSHALL R. WILLIAMS
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
422 WEST RIVERSIDE
SPOKANE, WASHINGTON 99201-0390
Telephone: (509) 624-5265
Telecopier: (509) 458-2728

[counsel & other addresses omitted]

May 31, 1995

Frank M. Machak, Director
Office of Freedom of Information
Privacy and Classification Review
United States Department of State
Washington, D.C. 20520

Re: *Freedom of Information Act Request No.*
9405059

Dear Mr. Machak:

I have your letter reporting a failure to locate the document which I had requested. Since receiving your letter, I received a copy of a letter from Mr. Marshall Williams of the Department of Justice. I enclose a copy of his letter. Mr. Williams reports that his agency did find the letter but is turning it over to your agency for determination as to whether it may be released to me.

EXHIBIT G

I would respectfully request that you expedite consideration of my request. I am very troubled by the Department of Justice's delay of nearly six months in the face of a statutory requirement that a response be made within 15 days. I realize that your agency is not responsible for the inexcusable delay at the Justice Department, but I respectfully request that you take it into account in expediting my request for a copy of the document requested.

In view of the changed circumstances created by Mr. Williams' forwarding the document to your agency, I am unclear as to whether I need to appeal your previous determination that the document was not located. If I need to to obtain the letter or to obtain expedited review as requested above, please treat this letter as a notice of appeal.

Very truly yours,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE

By /s/ LESLIE R. WEATHERHEAD
LESLIE R. WEATHERHEAD

LRW: gs
Enclosure

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
 A PROFESSIONAL SERVICE CORPORATION
 ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
 422 WEST RIVERSIDE
 SPOKANE, WASHINGTON 99201-0390
 Telephone: (509) 624-5265
 Telecopier: (509) 458-2728

[counsel & other addresses omitted]

May 31, 1995

Marshall R. Williams, Chief
 Freedom of Information/Privacy Act Unit
 Office of Enforcement Operations
 Criminal Division
 U.S. Department of Justice
 Washington, D.C. 20530

Dear Mr. Williams:

I have your letter of May 17, 1995. In your letter you report that you located the document I asked for in my request of November 29, 1994.

Your letter contains no explanation as to why it took six months to respond to a request to which, according to statute, I was entitled to a response within 15 days. Second, your letter indicates that the document is in your possession, however you did not forward the

EXHIBIT H

document to me. Your letter contains no suggestion that the letter is in any way subject to any exemption from disclosure under the Freedom of Information Act. Instead, you have chosen to further delay a response to my request by forwarding the document to another agency.

Your letter does not indicate whether your agency offers any quasi-appellate review of responses to Freedom of Information Act requests. If it does, please treat this letter as a formal notice of appeal, and request for such review, as I desire to exhaust my administrative remedies before bringing suit against the Department for its violations of the Act.

Respectfully yours,

WITHERSPOON, KELLEY,
 DAVENPORT & TOOLE, P.S.

By

/s/ LESLIE R. WEATHERHEAD
 LESLIE R. WEATHERHEAD

LRW: gs

[Seal omitted]

U.S. Department of Justice

Washington, D.C. 20530

July 03 1995

CRM-950056F

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Building
422 West Riverside
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is in response to your letter dated May 31, 1995.

Your November 29, 1994 request was not received by the Criminal Division until January 18, 1995. Pursuant to Department regulations, documents originated by a foreign government are referred to the Department of

EXHIBIT I

State for processing. We have forwarded your letter to the Office of Information and Privacy which handles all appeals.

Sincerely,

/s/ **MARSHALL R. WILLIAMS**
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

[Seal omitted]

**U.S. Department of Justice
Office of Information and Privacy**

Telephone: (202) 514-3642 Washington, D.C. 20530

July 7, 1995

Ms. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport
& Toole
1100 U.S. Bank Building
422 West Riverside
Spokane, WA 99201-0390

Re: Denial of 5/17/95

Dear Ms. Weatherhead:

This is to advise you that your administrative appeal from the action of the Criminal Division on your request for information from the files of the Department of Justice was received by this Office on June 30, 1995.

The Office of Information and Privacy, which has the responsibility of adjudicating such appeals, has a substantial backlog of pending appeals received prior to yours. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of

EXHIBIT J

receipt. Your appeal has been assigned number 95-1614. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. The necessity of this delay is regretted and your continuing courtesy is appreciated.

Sincerely,

/s/ DREMA A. HANSHAW
DREMA A. HANSHAW
Paralegal Specialist

[Seal omitted]

**U.S. Department of Justice
Office of Information and Privacy**

Telephone: (202) 514-3642 Washington, D.C. 20530

SEP 12 1995

Leslie R. Weatherhead, Esq.
Witherspoon, Kelley, Davenport
& Toole
1100 United States Bank Building
422 West Riverside Re: Appeal No. 95-1614
Spokane, WA 99201-0390 RLH:JGM:ERW

Dear Mr. Weatherhead:

You appealed from the action of the Criminal Division on your request for access to a July 28, 1994, letter from the British home office to George Proctor of the Criminal Division about the extradition and prosecution of Sally Croft and Susan Hagan.

As a result of discussions between Criminal Division personnel and members of my staff, I have decided to remand your request to the Criminal Division so that it, in consultation with the State Department, can make a release determination about this letter. Any information that can be released will be provided to you

EXHIBIT K

directly by the Criminal Division. If you are dissatisfied with the ultimate action taken on this matter, you may appeal again to this Office.

Inasmuch as my action does not constitute a complete grant of access, I am required by statute and departmental regulations to inform you of your right to judicial review. Such review is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is where the letter you seek is located.

Sincerely,

/s/ RICHARD L. HUFF
RICHARD L. HUFF
Co-Director

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

DEFENDANTS' ANSWER TO
COMPLAINT FOR INJUNCTION

[Filed: Jan. 19, 1996]

Defendants admit, deny and allege as follows:

1.1 This paragraph is a characterization of plaintiff's cause of action and basis for jurisdiction which requires no response. To the extent an answer may be deemed necessary, deny.

1.2 Admit.

2.1 Admit.

2.2 Admit.

3.1 Admit.

3.2 Admit that defendants identified and located the document requested by plaintiff, but deny remaining allegations contained in this paragraph.

3.3 Deny.

3.4 Admit.

3.5 Deny.

For further answer by way of affirmative defense, these defendants allege:

1. The complaint fails to state a claim upon which relief may be granted.

2. The requested document is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1)(A).

WHEREFORE, having fully answered, defendants pray that this action be dismissed and that the Court grant such other and further relief as may be appropriate.

DATED this 19th day of January, 1996.

JAMES P. CONNELLY
United States Attorney

/s/ JAMES R. SHIVELY
JAMES R. SHIVELY
Assistant U.S. Attorney

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

MAY 7 1995

MEMORANDUM

TO: Frank M. Machak, FOIA Coordinator
Department of State
Room 1239
2201 C Street, N.W.
Washington, D.C. 20520

FROM: Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Suite 1075 - Washington Center

SUBJECT: Freedom of Information Act Request -
L. Weatherhead, CRM-950056F

We are processing a request from the person named above. In searching our files, we have located the attached record which originated in an office for which you are responsible. We are referring this record to you for direct reply to the requester. We also have attached a copy of the request letter for your assistance and have advised the requester of this referral.

SHEILS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 1

Please address correspondence to us concerning this matter to: Marshall R. Williams, Chief, Freedom of Information/Privacy Act Unit, Office of Enforcement Operations, Criminal Division, Department of Justice, Washington, D.C. 20530. Attention: Mrs. Mulligan, (202) 514-1181.

[Seal omitted]

United States Department of State
Washington, D.C. 20520

Case Control No. 9502026

DEC 11 1995

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport &
Toole
U.S. Bank Building
422 West Riverside, Suite 1100
Spokane, WA 99201-0390

Dear Mr. Weatherhead:

I refer to your letter of November 29, 1994 to the Department of Justice, requesting the release of certain material under the Freedom of Information Act (Title 5 USC Section 552). The relevant document retrieved in response to your request has been referred to us for appropriate action.

After careful review of the document, we have determined that it may not be released.

Since the document was created by the British Government, we have consulted with their Embassy here in Washington to determine its releasability. The Em-

SHEILS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 2

bassy, in turn, consulted with the British Home Office which requested it be protected as confidential information. Consequently, the material in the document withheld in full is currently and properly classified in the interest of foreign relations. As such, it is exempt from release under subsection (b)(1) of the Freedom of Information Act.

With respect to material we have withheld under the Freedom of Information Act, you have the right to appeal our determination within 60 days. Appeals should be addressed to the Assistant Secretary for Public Affairs, Department of State, Washington, D.C. 20520-6800. The letter of appeal should refer to the case control number shown above.

Sincerely,

/s/ [Illegible]
Margaret P. Grafeld, Acting
Director
Office of Freedom of Information,
Privacy, and Classification Review

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
AND UNITED STATES DEPARTMENT OF STATE,
DEFENDANTS

AFFIDAVIT OF MARSHALL R. WILLIAMS

DECLARATION OF MARSHALL R. WILLIAMS

I, Marshall R. Williams, declare the following to be true and correct:

1. I am an attorney in the Office of Enforcement Operations of the Criminal Division of the Department of Justice. My specific assignment at the present time is Chief of the Freedom of Information Act/Privacy Act Unit (FOIA/PA Unit).

2. In such capacity, my duties are, *inter alia*: to act as liaison with other Divisions and Offices of the Department of Justice in responding to requests and litigation filed under both the Freedom of Information Act (5 U.S.C. §552 (1982 & Supp. II 1984) *amended by* Pub. L. No. 99-570 §§1801-1804 (Oct. 27, 1986)), and the Privacy Act of 1974 (5 U.S.C. 552a); to review requests

under these Acts which are referred to the Criminal Division by the Administrative Programs Unit of the Justice Management Division and other units of the Department; to review the search, the location of records, the preparation of responses of the Criminal Division to assure that determinations to withhold or to release records of the Criminal Division are in accordance with the provisions of both the Freedom of Information Act (FOIA) and Privacy Act (PA), and the Department of Justice regulations 16.40 *et seq.*[]; and to review copies of correspondence related to requests which have been assigned to the Criminal Division for determination and response. As Chief, I have authority to review records withheld under the FOIA and PA, and to defend actions brought under those Acts.

3. I make this declaration on the basis of knowledge acquired through the performance of my official duties.

4. Plaintiff, Leslie R. Weatherhead, made a FOIA request, dated November 29, 1994, to the Office of Public Affairs, Department of Justice. That office referred the request to the Department's Justice Management Division which is responsible for referring FOIA requests to the appropriate component of the Department.

5. The Justice Management Division received the request on January 9, 1995. The Justice Management Division determined that the appropriate component of the Department of Justice was the Criminal Division and referred the request to the FOIA/PA Unit.

6. The FOIA/PA Unit received the referral request on January 18, 1995. (Exhibit 1)

7. By letter to Plaintiff dated January 31, 1995, the FOIA/PA Unit acknowledged receipt of the request. (Exhibit 2)

8. By letter dated May 17, 1995, the FOIA/PA Unit informed Plaintiff that it had located the requested document. The letter further informed Plaintiff that, because a foreign government had created the document, it had been referred to the Department of State which is the office responsible for processing such records. The letter noted that the Department of State would review the document and respond directly to Plaintiff. (Exhibit 3)

9. The FOIA/PA Unit's referral to the Department of State is consistent with published departmental regulations located at 28 C.F.R. § 16.4(C) which states that:

When a component receives a request for a record in its possession, the component shall promptly determine whether another component, or agency, is better able to determine: (1) Whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and (2) whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion.

The regulations further state that:

If the receiving component determines that it is not the component or agency best able to determine whether or not to disclose the record in response to the request, the receiving component shall either: (i) Respond to the request, after consulting with

the component or other agency best able to determine whether or not to disclose the record and with any other component or agency having a substantial interest in the requested record or the information contained therein; or (ii) Refer the responsibility for responding to the request to the component best able to determine whether or not to disclose the record, or to another agency that generated or originated the record, but only if that other component or agency is subject to the provisions of the FOIA.

10. The referral to the Department of State was based upon the FOIA/PA Unit's determination that the Department of State was the agency best able to determine whether or not the requested document should be withheld.

11. Plaintiff sent a second letter dated May 31, 1995, requesting that the letter be treated as a formal notice of appeal. (Exhibit 4)

12. The FOIA/PA Unit received Plaintiff's May 31, 1995, letter on June 20, 1995. The FOIA/PA Unit responded to Plaintiff by letter dated July 3, 1995, indicating for a second time that pursuant to department regulations, documents originated by a foreign government are referred to the Department of State for processing. The FOIA/PA Unit also indicated in the July 3, 1995, letter that Plaintiff's request for an appeal had been forwarded to the Office of Information and Privacy which has responsibility for adjudicating such appeals. (Exhibit 5)

13. By letter to Plaintiff dated July 7, 1995, the Office of Information and Privacy indicated that it had received Plaintiff's appeal on June 30, 1995. The Office of Information and Privacy also indicated that it was processing a "substantial backlog of appeals" received prior to Plaintiff's and would inform Plaintiff of their decision as soon as possible. (Exhibit 6)

14. By letter dated September 12, 1995, the Office of Information and Privacy notified Plaintiff of its decision to remand the request to the Criminal Division for a final release determination. The letter further indicated that further review would be available following the Criminal Division's ultimate release determination. (Exhibit 7)

15. By letter dated December 11, 1995, the Department of State informed Plaintiff that it had determined to withhold the requested document in full. The letter explained that because the requested document was created by the British government, the Department of State had consulted with the British Embassy in Washington to determine releasability. The British Embassy in turn consulted with the British Home Office which requested the documents be protected as confidential information. Consequently, the documents in full were currently and properly classified in the interest of foreign relations. As such, the material is exempt from release under subsection (b)(1) of the Freedom of Information Act. (Exhibit 8)

16. The FOIA/PA Unit of the Criminal Division in turn responded directly to Plaintiff by letter dated February 9, 1996, as ordered by the Office of Informa-

tion and Privacy in its earlier review of Plaintiff's appeal.

17. In the February 9, 1996, letter the FOIA/PA Unit properly informed Plaintiff that the recent government shutdown had regrettably delayed their response. Further, in accordance with its consultation with the Department of State the information requested would not be released. This decision was based on the exemption set forth in 5 U.S.C. § 552(b)(1) which permits the withholding of information properly classified pursuant to Executive Order. (Exhibit 9)

18. The information requested was properly classified by the Department of State pursuant to Executive Order 12958, dated April 17, 1995, in effect at the time of this decision.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of March, 1996.

/s/ MARSHALL R. WILLIAMS
MARSHALL R. WILLIAMS

[EXHIBITS 1-8 OMITTED]

[Seal omitted]

**U.S. Department of Justice
Criminal Division**

Washington, D.C. 20530

CRM-950056F FEB 9 1996

Mr. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport
& Toole
1100 U.S. Bank Building
422 West Riverside Avenue
Spokane, Washington 99201-0390

Dear Mr. Weatherhead:

This is the Criminal Division's response to your appeal of May 31, 1995. We regret that the recent government shutdowns significantly delayed our response to your appeal.

In accordance with the opinion of the Office of Information and Privacy, we consulted with the Department of State concerning the document in question (letter from the British Home Office to George Proctor of the United States Department of Justice dated July 28, 1994, related to the extradition and prosecution of Sally Croft and Susan Hagan, comprising 2 pages). The Department of State advised us that they had consulted

WILLIAMS DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 9

with the British Embassy in Washington, D.C. as to whether the document could be released. The British Embassy in turn consulted with the British Home Office. That office advised the Embassy that the document should be protected as confidential information. Inasmuch as the originating office has determined that this information is classified, the Criminal Division has determined to withhold this document in full pursuant to the following FOIA exemption set forth in 5 U.S.C. 552(b):

- (1) which permits the withholding of information properly classified pursuant to Executive Order.

As this matter is in litigation, we are omitting our standard appeals paragraph.

Sincerely,

/s/ MARSHALL R. WILLIAMS
Marshall R. Williams, Chief
Freedom of Information/
Privacy Act Unit
Office of Enforcement Operations
Criminal Division

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF LESLIE R. WEATHERHEAD

[Filed: Oct 16 1996]

**STATE OF WASHINGTON COUNTY OF SPOKANE
COMES NOW LESLIE R. WEATHERHEAD**, plaintiff
herein, and being first duly sworn deposes and says as
follows:

1. I am the plaintiff in the above-captioned matter. I am over the age of eighteen years, and am competent to testify herein.

2. I learned late last week that after the Court rendered its final decision in this matter (dated September 9, 1996), someone I know made telephonic inquiry of a person employed by the English government about the letter we seek in this FOIA matter. I have known the person who made the inquiry for two years, and am completely confident in the truthfulness and reliability of this person, and am fully satisfied that I was given truthful information about what I relate below. I did

not ask that the inquiry be made, and I did [sic] truthful information about what I relate below. I did not ask that the inquiry be made, and I did not know that it would be made or had been made until I was so advised last week. I am being deliberately oblique about the identity of that person and of the person from whom the information set out herein was obtained, because I do not wish any person to come to grief solely for having acted in the interest of the truth (the government having exhibited such intense sensitivity over the matter).

3. According to the person who read the letter over the telephone, the letter which is at the heart of this case was, as we already knew, addressed to Mr. George Proctor of the United States Department of Justice, and was signed by an Ann Rutherford, whose name we did not know previously. The contents of the letter, which was read in full to the person who called me, may be summarized as follows:

(a) Following the extradition of Sally Croft and Susan Hagan to the United States, there were a number of points which caused concern.

(b) Sally Croft and Su Hagan could not be extradited for interstate transportation of firearms, because there is no correlative English offense, and therefore the United States could not try them for this offense under the dual criminality principle of Article 12 of the extradition treaty between the United States and Great Britain.

(c) Certain prominent persons in England have questioned whether Ms. Croft and Ms. Hagan could receive a fair trial, given the nature and age of the

case and the witnesses' testimony (which had been obtained by plea bargains).

(d) Ms. Croft and Ms. Hagan had asked that the British government seek an undertaking from the United States that the place of trial would be changed, but that is a matter for the United States courts. The British government passed its concerns on to the American authorities.

(e) The British Home Secretary requested that questions of local prejudice (i.e., in Portland, Oregon) be examined most carefully. The case had attracted considerable public and media attention. There was concern in England, within Parliament and outside, about the case, and there were expected to be Parliamentary debates about the case.

(f) The extradition case went strongly against Ms. Croft and Ms. Hagan in England. A copy of the opinions in the extradition matter would later be sent.

(g) There might conceivably be votes against the Home Secretary in Parliament in October of this year (i.e., 1994).

4. I am completely convinced of the authenticity of the foregoing, not only because of my strong faith in the truthfulness of the person who reported to me, as detailed above, but also from the surrounding circumstances: the details set out above correspond *precisely* to what I had inferred (from public facts surrounding the extradition of these women) that the letter *would* say. It was because I believed that the letter would say exactly what it says that I felt so strongly that it should

be laid before the district judge who tried Ms. Croft (the government actively opposed a venue change in that case, and never reported to the district court that the British Government had registered a strong concern about local prejudice in Oregon).

5. I assume that this Court cannot confirm for me whether the letter read to my friend is the same as the letter the Court read. Nonetheless, I make this information a matter of record at this time (on the belief that the letter read to my friend is authentic) for two reasons. First, the information provides at least some basis to grapple on appeal with the merits of the Court's judgment. It is necessary that I make a record of what I have been informed so as to be able to offer an intelligent argument to the Court of Appeals on the question whether the letter should be released, since this Court felt unable to disclose the basis for its decision. Second, if the letter this Court reviewed was materially differ-

ent from that read to my friend and outlined above, I assume this Court may wish to inquire, to learn why that is so.

Further your affiant sayeth not.

DATED this 23 day of September, 1996.

/s/ LESLIE R. WEATHERHEAD
LESLIE R. WEATHERHEAD

SUBSCRIBED AND SWORN to before me this 23 day of September, 1996.

/s/ MARY E. WILLIAMS
MARY E. WILLIAMS
Notary Public in and for the
State of Washington
Residing at Spokane,
Washington
My commission expires: 9-97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

vs.

UNITED STATES OF AMERICA; ET AL., DEFENDANTS

ORDER

[Filed: Dec 2 1996]

BEFORE THE COURT is plaintiff's Motion to Set Aside Judgment. Plaintiff is represented by Gregory J. Workland; defendants by Sanjay Bhamhani and Assistant United States Attorney James R. Shively. The matter was argued on November 22, 1996. This Order will memorialize the Court's oral ruling.

Background

The history of this action is set out at length in Orders entered March 29, 1996 and September 9, 1996. Shortly after defendants' motion for reconsideration was granted on the latter date, an associate of plaintiff's called an unidentified employee of the British government and requested information about the letter which was the subject of the FOIA request underlying this action. The individual contacted read the letter aloud verbatim and plaintiff's friend took notes. Plaintiff believes he now has the gist of the letter and summarizes

it in detail in an affidavit. He urges that with the letter now in the public domain, defendants can no longer have an interest in shielding it from disclosure. Because this information was not developed in time to move under FRCP 59(e), plaintiff is moving to re-open under FRCP 60(b)(6).

Analysis

(1) *Standard for reopening*: FRCP 60(b)(6) allows reopening of a judgment for "any other reason justifying relief from the operation of the judgment." While broad on its face, judicial construction has severely limited the availability of this relief. Only a showing that "extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment" will suffice. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.), cert. denied, 510 U.S. 813, 114 S. Ct. 60 (1993); see also, *Maraziti v. Thorpe*, 52 F.3d 252, 254-55 (9th Cir. 1995). There are thus two components to a FRCP 60(b)(6) inquiry: (1) is the judgment erroneous; and (2) did extraordinary circumstances prevent the moving party from avoiding entry of the erroneous judgment.

This case is certainly characterized by some extraordinary features, but it is not necessary to consider whether they satisfy the *Alpine Land* standard because for reasons to be addressed below, the judgment was not erroneous when entered.

(2) *Hearsay*: An unidentified British government employee provided information to an unidentified friend of plaintiff, who relayed this information to plaintiff, who reduced it to writing in his affidavit. Courts tend to allow some latitude when its officers-in-good-

standing make factual representations. But even assuming plaintiff's affidavit meets the substantive requirements of FRE 803(24), and satisfies the rule's procedural requirements (which it does not), that strips away only one level of hearsay.

(C) *Public domain*: As noted in prior Orders, defendants have urged throughout these proceedings that the national interest lies in protecting confidentiality in the abstract rather than in guarding the particular facts contained in the subject letter. "In essence, what defendants are saying is that it is the act of disclosure itself, not disclosure of the *contents*, which would harm national security." Order entered March 29, 1996 at page 11 (emphasis original). Defendants' argument has always been that the failure to preserve confidences is the harm. As urged by Mr. Sheils in his declaration:

Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest.

Assuming that the letter read to plaintiff's friend is the same letter presented in camera (and the Court

cannot confirm or deny that), it is remarkable that someone would publish this material in a phone call. Unless it is assumed that the publisher was engaging in an act of espionage, it seems that defendants' announced concerns about incurring the wrath of the British government may have been overstated.

Although yet another strange twist in an action characterized by curious turns, it does not matter that the generating government seems to be less concerned about the secrecy of the letter than is the receiving government. Plaintiff's waiver theory has been rejected by the overwhelming majority of courts to consider it.

[T]here is a critical distinction between official government disclosures or confirmations and indirect, or unofficial disclosures for purposes of FOIA national security exemptions[.] [O]nly "official disclosures"—direct acknowledgments by an authoritative government source—about information sought in a FOIA case can preclude an agency's invocation of an otherwise properly invoked Exemption 1 or Exemption 3 claim.

Schlesinger v. C.I.A., 591 F. Supp. 60, 66 (D.C. D.C. 1984).

Even a disclosure made by a government employee with lawful access to classified material does not necessarily constitute an "official disclosure." *Simmons v. U.S. Dept. of Justice*, 796 F.2d 709, 712 (4th Cir. 1986). This is not surprising. A contrary rule would result in untold thousands of government employees, contractors and consultants possessing de facto declassification authority. Even when an agency voluntarily places

substantial sensitive information into the public domain, that does not necessarily waive a FOIA exemption as to related classified information which the agency chooses not to disclose. *Public Citizen v. Department of State*, 11 F.3d 198, 201-03 (D.C. Cir. 1993).

The facts of this case are less compelling than those of the authorities cited above. No one affiliated with the United States government, officially or otherwise, played any role in effecting disclosure. That was accomplished by a subject of Great Britain, perhaps with authority, perhaps not. However, even if disclosure was appropriate so far as Great Britain is concerned, a foreign nation does not have declassification authority over materials classified by the United States.

Finally, the executive order itself forecloses plaintiff's contention. "Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information". EO 12958 § 1.2(c).

IT IS HEREBY ORDERED:

Plaintiff's Motion to Set Aside Judgment (Ct. Rec. 24) is DENIED.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 30th day of November 1996.

/s/ **FRED VAN SICKLE**
FRED VAN SICKLE
United States
District Judge